

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

E3 BIOFUELS, LLC,

Plaintiff,

vs.

BIOthane, LLC, successor in interest and liability to; PERENNIAL ENERGY, INC., MARVIN ENTERPRISES, INC. F/K/A, AMERICAN BOILER COMPANY, KATZEN INTERNATIONAL, INC.,

Defendants.

8:11CV44

MEMORANDUM AND ORDER

This matter is before the Court on Magistrate Judge F.A. Gossett's Findings and Recommendation (Filing No. 320), filed on September 19, 2013, and Defendant Perennial Energy, Inc.'s ("PEI") Statement of Objections to the Findings and Recommendation (Filing No. 337), filed as allowed by 28 U.S.C. § 636(b)(1)(C) on October 2, 2013. On October 7, 2013, Plaintiff, E3 Biofuels, LLC ("E3 Biofuels"), filed a Brief (Filing No. 345) in opposition to PEI's Objections. For the reasons explained below, the Court will adopt the Findings and Recommendation of the Magistrate Judge and PEI's motion to dismiss (Filing No. 271) will be denied.

BACKGROUND

This Court adopts the Background section from the Magistrate Judge's Findings and Recommendation, and that section is incorporated herein. In PEI's Objections, it argues that E3 Biofuels impermissibly manufactured diversity by assigning a legal claim to a diverse member either improperly or collusively and, as the alleged "real parties in interest," the AltEn entities, including DFRG, Inc., must be considered "members" of E3 Biofuels for diversity purposes. The Magistrate Judge addressed the question of

whether the citizenship of “members” of the AltEn entities should be considered for determining diversity jurisdiction. However, because PEI failed to raise its argument that E3 Biofuels impermissibly manufactured diversity in its briefing before the Magistrate Judge (Filing Nos. 271-73 and 289-90), he did not consider this claim in his Findings and Recommendation.

DISCUSSION

“The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to.” Fed. R. Civ. P. 72. In conducting its review, the Court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C).

PEI objected to the Magistrate Judge’s recommendation that this Court should conclude it has subject matter jurisdiction based on diversity. E3 Biofuels argues that PEI is not entitled to a de novo review of PEI’s new argument alleging impermissibly manufactured diversity because this argument was not made before the Magistrate Judge. This Court agrees that “[a] party objecting to a report and recommendation is ‘not entitled to a de novo review of an argument never raised’ before the magistrate judge.” *Salgado-Candelario v. Ericsson Caribbean, Inc.*, 614 F. Supp. 2d 151, 164 (D.P.R. 2008) (quoting *Borden v. Sec'y of Health and Human Servs.*, 836 F.2d 4, 6 (1st Cir.1987)). Therefore, this Court will not consider PEI’s claim that E3 Biofuels impermissibly manufactured diversity by assigning a legal claim to a diverse member either improperly or collusively.

The Magistrate Judge correctly concluded that E3 Biofuels and PEI are citizens of different states for purposes of diversity jurisdiction and that this Court has subject

matter jurisdiction in this case. This Court incorporates the Magistrate Judge's factual and legal findings herein. After a de novo review of the issues properly before this Court, the Court concludes that the Magistrate Judge fully, carefully, and correctly found the facts and applied the law; and PEI's motion to dismiss will be denied.

CONCLUSION

For the reasons stated above, this Court adopts the Magistrate Judge's Findings and Recommendation, and denies PEI's Objections and its motion to dismiss.

IT IS ORDERED:

1. The Magistrate Judge's Findings and Recommendation (Filing No. 320) are adopted;
2. Defendant Perennial Energy, Inc.'s Statement of Objections to the Magistrate Judge's Findings and Recommendation (Filing No. 337) are overruled; and
3. Defendant Perennial Energy, Inc.'s motion to dismiss (Filing No. 271) is denied.

Dated this 25th day of October, 2013.

BY THE COURT:

s/Laurie Smith Camp
Chief United States District Judge